IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HON'BLE THE CHIEF JUSTICE MR.V.K.BALI
&
THE HONOURABLE MR. JUSTICE S.SIRI JAGAN

WEDNESDAY, THE 4TH JANUARY 2007 / 14TH POUSHA, 1928

WA.No. 1150 of 2006

[AGAINST JUDGMENT IN O.P.NO. 19471/2002 DT. 1-2-2006]

APPELLANT: PETITIONER:

C.P. SREELAL,
T.C.XXXVIII/1276, `SREETILAK', KESARI LANE,
POOJAPPURA, THIRUVANANTHAPURAM.

BY ADV. SRI.BECHU KURIAN THOMAS

RESPONDENTS: RESPONDENTS:
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1. DISTRICT COLLECTOR,
THIRUVANANTHAPURAM.

2. DEPUTY TAHSILDAR (R.R),
KERALA FINANCIAL CORPORATION,THIRUVANANTHAPURAM.

3. KERALA FINANCIAL CORPORATION,
THIRUVANANTHAPURAM.

BY ADV. SRI.L.MOHANAN, SC, KFC

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 13/12/2006, THE COURT ON 04/01/2007 DELIVERED THE FOLLOWING:

V.K. Bali, C.J. & S. Siri Jagan, J.

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W. A. No. 1150 of 2006

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Dated this, the 4th January, 2007.

J U D G M E N T

Siri Jagan, J.

Appellant is the petitioner in O.P.No.19471/2002, which was dismissed by a learned Single Judge of this Court by judgment dated 1-2-2006. The issue involved in that original petition was the enforceability of a personal guarantee issued by the appellant to the Kerala Financial Corporation as the Managing Director of an industry by name Mothi Chemicals to which the Kerala Financial Corporation had advanced a loan of Rs. 30 lakhs. There was a loan agreement between the Company and the KFC mortgaging properties belonging to the Company as security for the loan. In addition to the same, a personal guarantee was also given by the appellant as Managing Director of the said Company. The Company defaulted payments of the amount of loan. Recovery proceedings were initiated. The land belonging to the Company, which was mortgaged to the KFC, was acquired by the Government. L.A.R. No.105/1992 was filed for enhancement of compensation before the civil court. The sale proceeds of the movables of the defaulted Company and the compensation including enhanced compensation awarded by the civil court amounting to Rs. 29.72 lakhs were paid over to the KFC on 11-6-1996. After receipt of the award amounts, the KFC initiated revenue recovery proceedings against the appellant on the basis of his personal guarantee on 22-5-1998 for the balance amounts due from the Company towards the loan account. Since the appellant did not pay the amount, proceedings under Section 65 of the Revenue Recovery Act were initiated by Ext. P6 notice. The appellant filed Ext. P8 reply to the same on 6-7-2002 and then filed the writ petition immediately thereafter. The main contention of the appellant in the

writ petition was that the recovery of the same was barred by limitation in view of the Supreme Court decision in State of Kerala v. V.R. Kalyanikutty, (1999) 3 SCC 657. The contention of the appellant-petitioner in the writ petition was that although the liability of the appellant as a guarantor is co-extensive with that of the principal debtor, namely, the Company, the guarantee executed by the appellant is a separate and distinct contract. In the above circumstances, the period of limitation for recovery of money on the basis of personal guarantee is three years from the date of default committed by the Company in payment of the loan amounts. According to the appellant-petitioner, in this case, the default occurred in 1986 itself and so viewed, the period of limitation ran out in 1989. He further contended that as per the loan agreement, loan was repayable in 13 half yearly instalments commencing from 10-11-1986 and ending on 10-11-1992. Therefore, the latest date on which the default could have occurred is 10-11-1992 and even going by that date, the period of limitation expired on 10-11-1995, ie. three years from 10-11-1992. However, the learned Single Judge did not accept the contentions of the appellant-petitioner. The learned Single Judge held that since the personal guarantee is not an independent agreement and the liability under the agreement is directly related to the loan agreement with the Company, recovery in fairness has to be first made against the borrower though nothing bars the KFC from proceeding for recovery against the appellant after default. The learned Judge was of the view that since the last instalment of the compensation awarded for acquisition of the property of the defaulter-Company was received by the KFC on 11-6-1996, revenue recovery notice issued on 22-5-1998 is perfectly within the period of limitation. Further, it was held that since the loan was covered by a

mortgage executed by the borrower-Company, and the last date for payment as per the loan agreement was 10-11-1992, recovery could be initiated both under the guarantee agreement and the loan agreement in time before 10-11-2004, i.e. before the expiry of 12 years from the last date for payment under the loan agreement. There was also further directions to the revenue recovery authorities to collect the details regarding the appellant's property and the appellant was also given the liberty to raise all his objections against Section 65 proceedings under the Revenue Recovery Act before the District Collector and the District Collector was directed to complete the proceedings for recovery against the appellant including Section 65 proceedings within three months from the date of production of copy of the judgment. Certain observations also were made directing the KFC to settle the matter by giving reduction in the rate of interest. The said judgment of the learned Single Judge is under challenge in this writ appeal.

2. The appellant's main contention is that the period of limitation for recovery of money due pursuant to a personal covenant is covered by Articles 19 and 28 of the Limitation Act. He would submit that the personal guarantee executed by the appellant is distinct from the loan agreement and if the Company does not pay the amount on the date provided in the agreement, the personal guarantee has to be invoked within three years from the date fixed for payment, in the agreement by the principal debtor. The findings of the learned Single Judge that the limitation period of 12 years would be applicable to the personal guarantee as well, is also challenged by the appellant. According to the counsel for the appellant, the recovery in the appellant's case is not on the basis of the mortgage but on the basis of the personal guarantee by the appellant. Based on

the decisions in Krishna Das Narayana Brahmananda Thirthar v. Valli Nadachi Lekshmi Nadachi and another, (ILR 1955 TC Series 1174) and State v. Jathavedan Namboothiripadu, (AIR 1959 Kerala 1), counsel contends contend that the period of 12 years would not apply in cases where recovery is attempted personally. On the basis of the decision in AIR 1923 Mad. 340, he would contend that although the liability of the appellant was co-extensive with that of the principal debtor, for the purpose of limitation, different periods would apply. There is another contention also that since the mortgaged property has been acquired by the Government, there can be no recovery on the basis of the mortgage and the 12 year limitation period would not apply in that case, in any event.

3. The appellant would also strongly dispute the contention that the limitation would start running from the date of payment of the compensation amount to the KFC. He would submit that time which has once begun to run, as a rule would continue to do so even though subsequent events occur which makes it impossible to bring an action for recovery. On that contention, the appellant would submit that the date of payment of the compensation amount cannot be taken as the starting period of limitation. Lastly, the appellant would contend that when remedy against the principal debtor has been impaired by the acquisition proceedings which fact was known to the creditor, the surety stands discharged. On these contentions, the appellant submits that the judgment of the learned Single Judge is liable to be set aside and the recovery proceedings against the appellant should be quashed.

4. In answer to the contentions, the learned standing counsel for the KFC would contend that in view of clauses 12 and 13 of Ext. R3(a), which is the personal guarantee executed by the appellant, the

guarantee would remain in force and effect till the last pai due to the Corporation under the loan agreement with the borrower Company remains unpaid. He would further contend that going by clause 12 of the guarantee agreement money is payable by the guarantor 'on demand' and therefore limitation would start to run only on the date when the KFC demands the guarantor for payment and not any time before. The standing counsel would further argue that Ext. R3(a) is a continuing guarantee and therefore the period of limitation would start running only after the remedy against the principal debtor is exhausted. He further submits that the period of limitation would start running as against the appellant on the basis of the personal guarantee only on the date when the compensation amount for acquisition of the property of the defaulted Company is received by the KFC on 11-6-1996 and therefore revenue recovery notice issued on 22-5-1998 is perfectly within the period of limitation. On these contentions, the standing counsel for the KFC would support the impugned judgment and seek dismissal of the writ appeal.

5. We have considered the rival contentions in detail.

6. As is clear from the pleadings and arguments advanced, the issue involved is only as to whether the enforcement of the personal guarantee executed by the appellant is barred by limitation. Counsel for the appellant, relying on two decisions of this Court in Krishna Das Narayana Brahmananda Thirthar v. Valli Nadachi Lekshmi Nadachi and another, (ILR 1955 TC Series 1174) and State v. Jathavedan Namboothiripadu, (AIR 1959 Kerala 1) contends that the agreement between the KFC and the principal debtor is separate and distinct from the personal guarantee executed by the appellant and the period of limitation of 12 years prescribed for enforcement of the mortgage of properties of the principal debtor as per the loan

agreement cannot be made applicable to the personal action for recovery of money from the appellant on the basis of the personal agreement between KFC and himself. According to counsel, the date fixed for payment of the last instalment of loan by the principal debtor is 10-11-1992 and for enforcing the personal guarantee against him the limitation period expired after three years from that date since the latest breach of contract is that date and limitation would start to run from that date. He would further submit that the date of payment of compensation by the State for acquisition of the mortgaged property to the KFC directly would not amount to an acknowledgment of liability since the same has not been with the consent of the principal debtor.

7. The law is settled that the personal guarantee agreement between the creditor and surety is distinct and separate from that between the creditor and principal debtor and for deciding the limitation period for enforcement of the personal guarantee cannot be reckoned on the basis of the security by way of the mortgage of immovable property given by the principal debtor. It is also settled law that limitation is applicable to revenue recovery proceedings also.

8. We are of opinion that the resolution of the dispute involved would essentially depend upon the answer to two questions, specifically raised by counsel for the KFC as to whether the guarantee executed by the appellant is a continuing guarantee and as to whether the limitation starts to run only when a demand is made by KFC for payment as per the guarantee and not before. Therefore, we have to first consider the nature of the guarantee executed by the appellant.

9. Before that, let us see the Article of the Schedule to the

Limitation Act under which limitation has to be reckoned. According to us, the relevant Section is Section 55 of the Limitation Act, which reads as under:

Description of suit	Period of Limitation	Time from which period begins to run
55. For compensation for the breach of any contract, express or implied not herein specified provided for.	Three years	When the contract is broken or (where there are successive breaches) when the Breach in respect of which the suit is instituted occurs or where the breach is continuing when it ceases.

9. The question then arises as to whether the guarantee given by the appellant is a continuing guarantee. 'Continuing Guarantee' is defined by Section 129 of the Indian Contract Act, 1872 thus:

> "129. Continuing Guarantee - A guarantee which extends to a series of transactions is called a "continuing guarantee"."

10. Although it may be argued that the present case does not extend to a series of transactions, the Supreme Court and this Court have held that a guarantee which extends to all indebtedness and liabilities of the principal debtor to the creditor would also be continuing guarantee which decisions we shall shortly discuss in relation to applicability to facts of this case. Before that, we may also note the meaning of 'continuing guarantee' in Black's Law Dictionary, Seventh Edition Page 712, which reads thus:

> "Continuing Guarantee. A guarantee that governs a course of dealing for an indefinite time or by a succession of credits - Also termed open guarantee."

The decision of Mrs. Margaret Lalitha Samuel v. Indo Commercial Bank Ltd (AIR 1979 SC 102) throws some light on as to what is a

continuing guarantee. In paragraph 10 of that judgment, the Supreme Court has observed thus:

> "10. We may first consider the question of limitation. As already mentioned by us, the submission of Shri Bal was that every item of an overdraft account was an independent loan, limitation for the recovery of which was determined by Art. 57 of the schedule to the Limitation Act, 1908. Limitation, according to the learned Counsel, started to run from the date of each loan. He relies on Basanta Kumar Mitra v. Chota Nagpur Banking Association Ltd. (AIR 1948 Pat. 18); Brojendra Kishore Roy Chowdhury v. Hindustan Co-operative Insurance Society Ltd. (ILR 44 Cal. 978 : (AIR 1918 Cal 707), National and Grindlays Bank Ltd. v. Tikam Chand Daga (AIR 1964 Cal 358) and Uma Shankar Prasad v. Bank of Bihar Ltd. (AIR 1942 Pat. 201) In our view, it is unnecessary for the purposes of the present case to go into the question of the nature of an overdraft account. The present suit is in substance and truth one to enforce the guarantee bond executed by the defendant. In order to ascertain the nature of the liability of the defendant, it is necessary to refer to the precise terms of the guarantee bond rather than embark into an enquiry as to the nature of an overdraft account. Exhibit 57 is the guarantee bond executed by the defendant and her husband on 23rd Oct. 1944. It is addressed to the Indo Commercial Bank Ltd., Madras, and is i the following terms:
>
> "Dear Sirs,
>
> In consideration of your having agreed to allow overdraft accommodation up to Rs. 10,00,000 (Rupees Ten Lakhs only) to the Modern Hinsuarn Food Products Ltd., Poona, We, C.B. Samuel and M.L. Samuel, the undersigned do hereby jointly and severally guarantee to you, the Indo-Commercial Bank Limited the re-payment of all money, which shall at any time be due to you from the said Modern Hindustan Food Products Ltd., on the general balance of their accounts with you or on any account whatever such balances to include all interest, charges, commission and other expenses which you may charge as bankers and also the due payment at maturity of any promissory note or other negotiable instrument on the security or in respect of which any credit or advance shall be made.
>
> And we hereby declare that this guarantee shall be a continuing guarantee to the extent at any one time for Rupees 10,00,000 (Rupees Ten Lakhs only) and shall not be considered wholly or partially satisfied by the payment at any one time or at different times of any sums of money due on such general balance of account but shall extend and cover and be a security for every and all further sums at any time due to you thereon. And we further declare that you may grant to the Modern Hindustan Food Products Ltd., any indulgence without discharging our liability."

The guarantee is seen to be a continuing guarantee and the undertaking by the defendant is to pay any amount that may be due by the company at the foot of the general balance of its account or any other account whatever. In the case of such a continuing guarantee, so long as the account is a live account in the sense that it is not settled and there is no refusal on the part of the guarantor to carry out the obligation, we do not see how the period of limitation could be said to have commenced running. Limitation would only run from the date of breach under Art. 115 of th schedule to the Limitation Act, 1908. When the Bombay High Court considered the matter in the first instance and held that the suit was not barred by limitation, J.C. Shah, J. speaking for the Court, said:

> "On the plain words of the letters of guarantee it is clear that the defendant undertook to pay any amount which may be due by the Company at the foot of the general balance of its account or any other account whatever . . . . . We are not concerned in this case with the period of limitation for the amount repayable by the Company to the bank. We are concerned with the period of limitation for enforcing the liability of the defendant under the surety bond . . . . . We hold that the suit to enforce the liability is governed by Art. 115 and the cause of action arises when the contract of continuing guarantee is broken, and in the present case we are of the view that so long as the account remained live account, and there was no refusal on the part of defendant to carry out her obligation, the period of limitation did not commence to run."

We agree with the view expressed by Shah, J. The intention and effect of a continuing guarantee such as the one with which we are concerned in this case was considered by the Judicial Committee of the Privy Council in Wright v. New Zealand Farmers Co-operative Association of Canterbury Ltd. (1939 AC 439). The second clause of the guarantee bond in that case was in the following terms:

> "This guarantee shall be a continuing guarantee and shall apply to the balance that is now or may at any time hereafter be owing to you by the William Nosworthy and Robert Nosworthy on their current account with you for goods supplied and advance made by you as aforesaid and interest and other charges as aforesaid."

A contention was raised in that case that the liability of the guarantor was barred in respect of each advance made to the Nosworthys on the expiration of six years from the date of advance. The Judicial Committee of the Privy Council expressed the opinion that the matter had to be determined by the true construction of the guarantee. Proceeding to do so, the judicial Committee observed (at p. 449):

> "It is no doubt a guarantee that the Association will be repaid by the Nosworthys advance made and to be made to them by the

> Association together with interest and charges, but it specifies in col. 2 how that guarantee will operate namely, that it will apply to (i.e. the guarantor guarantee repayment of) the balance which at any time thereafter is owing by the Nosworthys to the Association. It is difficult to see how effect can be given to this provision except by holding that the repayment of every debit balance is guaranteed as it is constituted from time to time, during the continuance of the guarantee by the excess of the total debits over the total credits. If that be the true construction of this document, as their Lordships think it is, the number of years which have expired since any individual debit was incurred is immaterial. The question of limitation could only arise in regard to the time which had elapsed since the balance guaranteed and sued for had been constituted."

Later it was again observed (at p. 450):

> "That document, in their opinion, clearly guarantees the repayment of each debit balance as constituted from time to time, during a continuance of the guarantee, by the surplus of the total debits over the total credits, and accordingly at the date of the counter claim the Association's claim against the plaintiff for payment of the unpaid balance due from the Nosworthys, with interest, was not statue-barred."

(Emphasis supplied)

Although one may say that in that case, the Supreme Court was considering a case of over draft which may involve a series of transactions coming within the definition under Section 129 of the Contract Act, a Division Bench of this Court has, in the decision of Union Bank of India, Ernakulam v. T.J. Stephen & others, (AIR 1990 Kerala 180) has applied this decision to facts of a case which are almost identical to that of the present case. Paragraphs 12 to 15 of the said decision is directly applicable to this case, which read thus:

> "12. Here, the question is, what is the real content and width of the contract of guarantee executed by defendants 2 and 3. It has to be understood from the contract of guarantee executed by defendants 2 and 3. Admittedly, it is a continuing guarantee and the main clause of the guarantee stipulates that this guarantee shall be a continuing security binding on defendants 2 and 3. When in the agreement, defendants 2 and 3 unequivocally agree that they undertake a guarantee that it shall be a continuing security, the court has to examine as to what is the exact meaning purpose and nature of this obligation of the guarantor. For what purpose, the security is given is made clear in Ext. A1 agreement. The security is for whatever amount that is due to the Bank from the principal-debtor.

So long as the agreement Ext. A2 is alive and in force defendants 2 and 3 are liable for the amount due to the Bank because they have secured the amount by executing the agreement. The effect of such an agreement has been considered very clearly by the Supreme Court in AIR 1979 Supreme Court 102 (Margarnet Lalita v. Indo Commercial Bank Ltd.). The Supreme Court observed thus:-

> "In the case of a continuing guarantee and an undertaking by the defendant to pay any amount that may be due by a company to a Bank on the general balance of its account or any other account, so long as the account is a live account in the sense that it is not settled and there is no refusal on the part of the guarantor to carry out the obligation, the period of limitation for a suit to enforce the bond could not be said to have commenced running. Limitation would only run from the date of breach under Art. 115."

Before the institution of the suit, the guarantors did not withdraw their guarantee, or there was no occasion for the refusal on the part of the guarantors to carry out the obligation. The Supreme Court has said that so long as the account is a live account the guarantors are liable. Further, the Supreme Court has made it clear what exactly is a live account when it is said that a live account is one that is not settled, that means a live account is one which has not been discharged by payment or by other arrangement.

13. In this case, there is no dispute that the amount due to the Bank has not been paid by the principal-debtor or by the guarantors. So, in this case there is an undischarged live liability for which the guarantors have obliged by their agreement that they will be responsible for that liability of the principal-debtor.

14. A somewhat identical question was considered by Raman Nayar, J. as he then was, in 1961 Ker LT 434. It this case the learned Judge very pertinently considered the difference between the extinguishment of a debt and the content of the concept of an enforceability of a debt. Generally the statute of limitation does not and cannot extinguish a debt applying the articles of limitation, of course, except in one case which is dealt with under S. 27 of the Limitation Act. It is pertinent to note that under S. 27 of the Limitation Act, the statute has made it clear that on the determination of the period limited for the institution of a suit for possession or any property his right to such property shall be extinguished. But in regard to all cases where the statute provides a period for instituting a suit, such a provision is absent.

15. Considering the question of a continuing guarantee, Raman Nayar, J. as he then was said:-

> "The claims being alive as against the 1st defendant, it seems to me from the terms of the guarantee bond, Ext. P1, that

> they are alive so far as the 2nd defendant's guarantee also is concerned. For, Ext. P4 is in very wide terms. Cl. (b) shows that it is a continuing guarantee determinable only after three months' notice - there is no case that it has been so determined - and clause (c) states that the guarantee shall be applicable to the ultimate general balance that may become due from the principal, the term, "General balance" being defined in the opening sentence of ext. P4 as inclusive of all sums of money which may then or at any time be owing to the bank from the principal."

Same is the position in this case. Ext. A2 makes it clear that the guarantee will extent to all indebtedness and liabilities of the principal debtor to the Bank. Further it has to be noted that in the guarantee agreement, the guarantors have agreed that their liability to the Bank shall be that of the principal-debtor and at the Bank's option, the Bank may treat the guarantor as primarily liable for the debt of the principal or the balance from time to time due in respect thereof provided always that the amounts for which the guarantor will be liable under the agreement shall not exceed Rs. 40,000/- and interest on such amount or on such less sum as may be due at the rate of six per cent per annum from the date of the principal' default until payment."

(Emphasis supplied)

11. Let us look at the relevant clauses in Ext. R3(a) which is guarantee executed by the appellant. We may extract clauses 5 to 12 with advantage:

> "(5) The Guarantee herein contained shall be enforceable against the Guarantors notwithstanding that the securities specified in the loan agreement dated 5-12-1984 or any of them shall at the time when proceedings are taken against the Guarantors hereunder be outstanding or unrealised.
>
> (6) In order to give effect to the Guarantee herein contained the Corporation shall be entitled to act as if the Guarantor was the principal debtors to the Corporation for all payments and covenants guaranteed by them as aforesaid to the Corporation.
>
> (7) The guarantee herein contained shall not be revoked or effected by the release of any one or more of the Guarantor and shall continue to be binding and operative as regard the remaining Guarantors.
>
> (8) The Guarantee herein contained is one for all amounts advanced by the Corporation to the Borrower Company under the said loan Agreement and also for all interest costs and other moneys

which may from time to time become due and remain unpaid to the Corporation hereunder and shall remain in force until all such moneys shall be paid off in full with interest and other charges.

(9) The Guarantee herein contained shall not be revoked or affected by the death of any of the Guarantor but shall in all respects and for all purposes be binding and operative upon the heirs executors and administrators of the deceased guarantor until repayment of all moneys due to the Corporation as aforesaid.

10. The liability of the Guarantor under this guarantee shall not be affected by any change in the constitution of the Borrower Company or Kerala Financial Corporation.

(11) That any account settled or stated between the Corporation and the Borrower Company or admitted by the Borrower Company call be accepted by the Guarantors as conclusive evidence. A letter in writing issued by the Corporation stating the amount at any particular time payable under this guarantee shall be conclusive evidence against the Guarantor.

(12) If at any time default shall be made in payment of the loan amount or interest thereon or any other moneys for the time being due to the Corporation, the Guarantor shall pay to the Corporation on demand the principal moneys, interest and other moneys which shall then be due to the Corporation as aforesaid and in the event of their failure to pay the same the Corporation shall be entitled to recover the same with interest from the Guarantors jointly and severally/personally and from their properties and the Guarantors will indemnify and keep indemnified the Corporation against all loss of principal, interest and other moneys secured by the said loan Agreement dated 5-12-1984 and all costs charges and expenses whatsoever which the Corporation may incur by reason of any default on the part of the borrower company its successors, executors, administrators or assigns.

(13) The guarantee shall remain in full force and effect so long as the last pie due to the Corporation under he loan Agreement with the Borrower Company remains unpaid."

(Emphasis supplied)

We are of opinion that clauses 6, 8 and 13 are in pari materia with those considered in the Division Bench decision supra (See particularly the underlined portions). In view of the above decisions, we need not look any further to come to the conclusion that the guarantee executed by the appellant is a continuing guarantee.

12. Then the next question would be as to when has the period of limitation begun to run in this case. Applying the Supreme Court decision (quoted supra), since the account with the principal debtor is a live account in the sense that it is not settled, it has to be looked into as to whether there is a demand made on and refusal on the part of the guarantor to carry out his obligation under the guarantee agreement. Even according to the appellant, the first demand was made on him by the revenue recovery notice issued on 25-6-2001, although the KFC would contend that the revenue recovery requisition was made on 22-5-1998 under Section 69(2) of the Revenue Recovery Act. Since the revenue recovery notice itself is the demand made on the appellant, going by the decisions quoted supra, the question of limitation does not arise since the account with the principal debtor was a live one and before initiation of the revenue recovery proceedings, there was no refusal to carry out the obligation by the appellant on a demand made by the KFC at any time before.

13. We further note that in clause 12 of Ext. R3(a) on default in payment of loan amount or interest thereon or any other moneys for the time being due to the Corporation the guarantors shall pay to the Corporation on demand and in the event of his failure, the Corporation shall be entitled to recover the same with interest from the guarantor. The Supreme Court had occasion to consider the effect of a clause of this nature in a guarantee agreement, in the decision of Syndicte Bank v. Channaveerappa Baleri, which has been reported as a short note in 2006 (2) KLT S.N. 53 (Case No. 69). The short note reads thus:

> "In the case on hand, the guarantee deeds specifically state that the guarantors agree to pay and satisfy the bank on demand and interest will be payable by the guarantors only from the date of demand. In a case where the guarantee is payable on demand, the limitation begins to run when the demand is made and the guarantor

> commits breach by not complying with the demand. The meaning attached to the expression 'on demand' as 'always payable' or 'payable forthwith without demand' is not one of universal application. The said meaning applies only in certain circumstances. The said meaning is normally applied to promissory notes or bills of exchange payable on demand. We may refer to Arts. 21 and 22 in this behalf. Article 21 provides that for money lent under an agreement that it shall be payable on demand, the period of limitation (3 years) begins to run when the loan is made. On the other hand, the very same words 'payable on demand' have a different meaning in Art. 22 which provides that for money deposited under an agreement that it shall be payable on demand, the period of limitation (3 years) will begin to run when the demand is made. Thus, the words 'payable on demand" have been given different meaning when applied with reference to 'money lent' and 'money deposited'. In the context of Art. 21, the meaning and effect of those words is 'always payable' or payable from the moment when the loan is made, whereas in the context of Art. 22, the meaning is 'payable when actually a demand for payment is made'. The terms of guarantee thus, make it clear that the liability to pay would arise on the guarantors only when a demand is made. Article 55 provides that the time will begin to run when the contract is 'broken'. Even if Art. 113 is to be applied, the time begins to run only when the right to sue accrues. In this case, the contract was broken and the right to sue accrued only when a demand for payment was made by the Bank and it was refused by the guarantors. When a demand is made requiring payment within a stipulated period, say 15 days, the breach occurs or right to sue accrues, if payment is not made or is refused within 15 days. If while making the demand for payment, no period is stipulated within which the payment should be made, the breach occurs or right to sue accrues, when the demand is served on the guarantor. When the demand is made by the creditor on the guarantor, under a guarantee which requires a demand, as a condition precedent for the liability of the guarantor, such demand should be for payment of a sum which is legally due and recoverable from the principal debtor. If the debt had already become time-barred against the principal debtor, the question of creditor demanding payment thereafter, for the first time, against the guarantor would not arise. When the demand is made against the guarantor, if the claim is a live claim (that is, a claim which is not barred) against the principal debtor, limitation in respect of the guarantor will run from the date of such demand and refusal/non-compliance. Where guarantor becomes liable in pursuance of a demand validly made in time, the credit can sue the guarantor within three years, even if the claim against the principal debtor gets subsequently time-barred."

14. The appellant does not have a case that the debt against the principal debtor had become barred at the time when recovery

proceedings were initiated against him. Even otherwise, since the compensation amount for acquisition of the property mortgaged by the principal debtor was credited to the loan account with the KFC lastly on 11-6-1996, according to us, this payment would certainly be a payment as contemplated under Section 19 of the Limitation Act, since Section 73(2) of the Transfer of Property Act confers on a mortgagee a right to claim payment of the mortgage money out of the amount due to the mortgagor as compensation.

Section 73 (2) of the Transfer of Property Act reads thus:

> **"73. Right to proceeds of revenue sale or compensation on acquisition**:-
>
> xx xx xx
>
> (2) Where the mortgaged property or any part thereof or any interest therein is acquired under the Land Acquisition Act, 1894 (1 of 1894); or any other enactment for the time being in force providing for the compulsory acquisition of immovable property, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of the amount due to the mortgagor as compensation."

Therefore, the payment made on 11-6-1996 as compensation for acquisition of the mortgaged property is certainly a payment on behalf of the mortgagor and would qualify as a payment as contemplated in Section 19 of the Limitation Act. The proceedings under the Revenue Recovery Act was initiated on 22-5-1998 by a requisition to the Collector on 22-5-1998 under Section 69(2) of the Revenue Recovery Act. In the decision of the Supreme Court in State of Kerala v. V.R. Kalliyanikitty, (1999 (2) KLT 146 (SC), it has been held thus in paragraphs 17 and 18.

> "17. In view of the interpretation which we have put on S. 71 of the Kerala Revenue Recovery Act it is not necessary for us to consider whether by making a requisition under S. 62(2) a creditor sets in motion a process of recovery which is a judicial process which would attract the Law of Limitation. There is a clear provision for adjudication under S. 70(3) is not affected by S. 72 of the said Act as

> was contended before us by the respondents. S. 72 merely provides that every question arising between the Collector or the authorised officer and the defaulter relating to execution, discharge or satisfaction of a written demand issued under this Act will be determined not by a suit but under the provisions of the said Act. S. 72 does not cover the right of a person making a payment under protest to institute a suit which is expressly provided for under S. 70 sub-ss. 70 and 71, amounts due under S. 71 are those amounts which the creditor could have recovered had he filed a suit.
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> 18. In the premises under S. 71 of the Kerala Revenue Recovery Act claims which are time-barred on the date when a requisiton is issued under S. 69(2) of the said Act are not amounts due under S. 71 and cannot be recovered under the said Act. Our conclusion is based on the interpretation of S. 71 in the light of the provisions of the Kerala Revenue Recovery Act."

In this connection, we also note with approval a decision of a Single Judge of this Court in Halimathu Beevi v. State of Kerala, (1999 (3) KLT 279) wherein it was held that date of requisition under Section 69(2), in Form No. 24 of the Revenue Recovery Act should be taken as the date of initiation of the recovery proceedings . Therefore, as on 22-5-1998, when the requisition under the Revenue Recovery Act was made, the debt against the principal debtor was not time barred. That being so, the demand on that date would be the demand as contemplated in the decision of the Supreme Court in Channaverappa Belari's case (supra) and therefore that decision squarely applies to the facts of the case against the appellant.

15. Relying on the decisions of the Supreme Court in State of M.P. v. Kaluram (AIR 1969 S C 1105) and State Bank of Saurashtra v. Chitranjan Rangnath Raja and another, [(1980) 4 SCC 516), counsel for the appellant contends that on account of the acquisition of the properties mortgaged by the principal debtor, the acquisition proceedings which were in in the knowledge of the creditor would have the effects of discharging the surety. We do not find any merit in this contention. Such discharge can be claimed only when the remedy of the surety against the principal is impaired by any act or omission

on the part of the creditor. Here, acquisition of the mortgaged property does not amount to an impairment of the remedy of the appellant against the principal debtor on account of any act or omission on the part of the KFC. Further, it is to be noted here that the appellant-surety is the Managing Director of the principal debtor Company and any act on behalf of the Company has to be done by the appellant himself, and therefore there is no scope for such a contention which would have the effect of discharging the appellant from liability.

For the foregoing reasons, we do not find any merit in the writ appeal and accordingly, the same is dismissed.

V.K. Bali, Chief Justice.

S. Siri Jagan, Judge.

Tds/